

ARKANSAS SUPREME COURT

No. CR 02-90

Opinion Delivered

June 25, 2009

ERIC BURGIE
Petitioner

v.

STATE OF ARKANSAS
Respondent

PRO SE PETITION AND SUPPLEMENTAL PETITION TO REINVEST JURISDICTION IN THE TRIAL COURT TO CONSIDER A PETITION FOR WRIT OF ERROR CORAM NOBIS, MOTIONS FOR APPOINTMENT OF COUNSEL AND FOR TRANSCRIPTS AND FOR LEAVE TO AMEND, MOTION FOR DOCUMENTS UNDER THE FREEDOM OF INFORMATION ACT, MOTION FOR COPIES OF MOTION TO AMEND, AND MOTION “TO CLARIFY CLAIMS FOR ISSUANCE OF WRIT” [CIRCUIT COURT OF GARLAND COUNTY, CR 2000-366]

MOTIONS TO AMEND AND TO CLARIFY CLAIMS DENIED; PETITIONS DENIED; MOTION FOR COUNSEL AND TRANSCRIPTS MOOT; MOTIONS FOR DOCUMENTS AND FOR COPIES DENIED.

PER CURIAM

In 2001, a jury found petitioner Eric Burgie guilty of capital murder and aggravated robbery and sentenced him to life imprisonment without parole. This court affirmed the judgment. *Burgie v. State*, CR 02-90 (Ark. Feb. 20, 2003) (per curiam). Petitioner now brings the instant petitions in which he requests this court to reinvest jurisdiction in the trial court so that he may proceed with a

petition for writ of error coram nobis.¹ After a judgment has been affirmed on appeal, a petition filed in this court for leave to proceed in the trial court is necessary because the circuit court can entertain a petition for writ of error coram nobis only after we grant permission. *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001) (per curiam). Petitioner also filed a motion requesting appointment of counsel and copies of transcripts, and later filed a motion seeking leave to amend the petitions. Petitioner also filed, with the petitions, a motion seeking certain documents at public expense under the Arkansas Freedom of Information Act, Arkansas Code Annotated §§ 25-19-101 – 25-19-109 (Repl. 2002 and Supp. 2007). Subsequently to the State’s responses to the petitions and motion to amend, petitioner filed additional motions seeking copies at public expense and seeking to clarify his claims for issuance of the writ.

In his petition and supplemental petition, petitioner alleges as a basis for the writ that both his and a codefendant’s confessions were obtained in violation of certain constitutional rights. Petitioner alleges that the codefendant has provided an affidavit in which he avers that the police officer who obtained the confessions testified during the codefendant’s pretrial hearing that he used coercive tactics against the defendants. In his supplemental petition, petitioner characterizes the allegations as prosecutorial misconduct, claiming that the prosecution withheld evidence in the form of the officer’s testimony at the codefendant’s pretrial hearing. He alleges that the officer’s testimony in his codefendant’s case conflicted with the officer’s previous testimony in petitioner’s trial to the effect that he had not violated petitioner’s rights.

In his motion under the Freedom of Information Act, petitioner seeks the transcripts from his

¹For clerical purposes, the instant petition was assigned the same docket number as the direct appeal.

trial and his codefendant's pretrial hearing and a motion for discovery from his trial record at public expense. In his motion to amend the petition, he seeks to add additional claims concerning the sufficiency of the probable cause affidavit supporting the warrant for his arrest. In his motion to clarify claims, petitioner reasserts his previous claims, alleging the prosecution withheld evidence of the officer's testimony, and offers additional arguments as to why these allegations should support a claim for issuance of the writ. In his final motion, petitioner seeks a file-marked copy of his motion to amend the petition at public expense.

A writ of error coram nobis is an extraordinarily rare remedy, more known for its denial than its approval. *Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). The function of the writ is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004). A writ of error coram nobis is appropriate when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown. *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997).

Error coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. *Penn v. State*, 282 Ark. 571, 670 S.W.2d 426 (1984) (citing *Troglin v. State*, 257 Ark. 644, 519 S.W.2d 740 (1975)). The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature. *Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam). For the writ to issue following the affirmance of a conviction, the petitioner must show a fundamental error of fact extrinsic to the record. *Thomas v. State*, 367 Ark. 478, 241 S.W.3d 247 (2006) (per curiam). It is a petitioner's burden to show that the writ is

warranted. *Cloird v. State*, 357 Ark. 446, 182 S.W.3d 477 (2004).

We have held that the writ is available to address errors found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal. *Sanders v. State*, 374 Ark. 70, ___ S.W.3d ___ (2008) (per curiam). In his motion to amend, petitioner contends that the prosecution withheld information concerning the basis for certain statements in the affidavit of probable cause. In his petition and supplemental petition, he contends that the prosecution withheld information as to the true nature of the police officer's interrogation of the defendants. Petitioner contends that these actions are violations of the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963).

There are three elements of a *Brady* violation, as follows: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; (3) prejudice must have ensued. *Larimore*, 341 Ark. at 404, 17 S.W.3d at 91. Petitioner's allegations do not assert facts that were hidden or unknown as the result of a *Brady* violation.

In the motion to amend, petitioner alleges that the prosecution did not disclose details omitted from statements in the probable cause affidavit as to what specific information led the police to a particular witness. Petitioner does no more than challenge the sufficiency of the affidavit and does not explain how the omitted statements might have been used by the defense, if that information had been available at trial. Petitioner alludes to the use of perjured testimony by the prosecution, but does not state any facts that would show how the purportedly withheld information might have prevented the alleged use of perjured testimony. Moreover, the affidavit supporting the warrant is

a part of the record, was not suppressed by the prosecution, and could have been challenged at trial. Any missing information could have been uncovered and utilized by defense counsel.

While there is no specific time limit for seeking a writ of error coram nobis, due diligence is required in making an application for relief and in the absence of a valid excuse for delay, the petition will be denied. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005). Due diligence requires satisfaction of certain conditions, as follows: (1) the defendant be unaware of the fact at the time of trial; (2) the defendant could not have, in the exercise of due diligence, presented the fact at trial; (3) upon discovering the fact, the defendant did not delay bringing the petition. *Id.* With the exercise of due diligence, petitioner could have presented the fact of any undisclosed details concerning the statement in the affidavit at trial.

As to the allegations in the petition and supplemental petition claiming that the prosecution withheld evidence in the form of the officer's testimony at the codefendant's pretrial hearing, petitioner asserts the testimony took place after petitioner's trial was concluded. Based upon petitioner's own assertions, the information could not have been withheld by the prosecution because the information was not available at the time of petitioner's suppression hearing or trial. In addition, the fact of any coercive tactics used against petitioner would have been known by petitioner before his trial and could have been brought to the trial court's attention at petitioner's suppression hearing. As we noted in our opinion on direct appeal, petitioner presented no such evidence at the suppression hearing. Any coercive tactics used against petitioner's codefendant would not have prejudiced petitioner because the codefendant did not testify at petitioner's trial.

Petitioner's motion to clarify adds nothing further of any significance to his claims and appears to simply attempt to reply to the response to his petition. We therefore deny that motion.

Because petitioner does not present any basis to reinvest jurisdiction in the trial court to consider a petition for writ of error coram nobis, it is not necessary to consider petitioner's motion for counsel and transcript. That motion is moot.

As to petitioner's motions requesting documents under the Freedom of Information Act and file-marked copies of the motion to amend, in light of our holding as to the petitions, petitioner fails to identify any specific need for the documents he requests. He simply asserts that he is indigent and incarcerated. Those two motions are therefore denied.

A petitioner is not entitled to a copy of material on file with this court at public expense unless he or she demonstrates some compelling need for specific documentary evidence to support an allegation contained in a petition for postconviction relief. *Bradshaw v. State*, 372 Ark. 305, 275 S.W.3d 173 (2008) (per curiam). Indigency alone does not entitle a petitioner to free photocopying. *Nooner v. State*, 352 Ark. 481, 101 S.W.3d 834 (2003) (per curiam). The Freedom of Information Act does not require an appellate court to provide photocopying at public expense. *Moore v. State*, 324 Ark. 453, 921 S.W.2d 606 (1996) (per curiam).

Petitioner only asserts a vague claim that he requires a file-marked copy of the motion to amend "for his file and use in this court, and other courts of proper jurisdiction." He does not identify any specific need as to that motion. As to the additional documents he requests, petitioner has not demonstrated that even if requested in conjunction with the petitions filed, the documents would provide any support for his claims in the petitions. Whatever those documents contain, petitioner failed to allege a basis for error coram nobis relief.

We note that when an original action has been filed in this court, the material pertaining to it remains permanently on file with the clerk. Unless it is being maintained under seal, persons may

review the material in the clerk's office and photocopy all or portions of it. An incarcerated person desiring a photocopy of material on file here may write this court, remit the photocopying fee, and request that the copy be mailed to the prison. All persons, including prisoners, must bear the cost of photocopying. *Bradshaw*, 372 Ark. at 305, 275 S.W.3d at 174.

Motions to amend and to clarify claims denied; petitions denied; motion for counsel and transcripts moot; motions for documents and for copies denied.